UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

CHENEY CONSTRUCTION INC.

and **Case 17-CA-22517**

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY AND VICINITY, LOCAL 918

Stanley D. Williams, Esq. **of Overland Park, Kansas for the General Counsel.**

Robert C. Johnson, Esq. and R. Anthony Costello, Esq. **of Kansas City, Missouri for the Respondent.**

Michael J. Stapp, Esq. **of Kansas City, Kansas for the Charging Party.**

SUPPLEMENTAL DECISION

Statement of the Case

Thomas M. Patton, Administrative Law Judge: On February 4, 2005, the Board issued its Order adopting the findings and conclusions of Administrative Law Judge Albert A. Metz in the underlying case, *Cheney Construction,* 344 NLRB No. 9 (2005). Judge Metz found that Respondent had discriminated against employees Randy Mumpower, David Randy Johns and Kenneth Fairchild by refusing to consider them for hire and refusing to hire them on August 27, 2003, because of their union affiliation. Judge Metz's order, adopted by the Board, requires that the discriminatees be a made whole.

An issue in this compliance proceeding is how long employee-applicants Mumpower, Johns and Fairchild would have remained employees of Respondent had they not been discriminated against. That issue is controlled by the Board's rebuttable presumption of continuing employment in the construction industry, as set forth in *Dean General Contractors,* 285 NLRB 573 (1987); see also *Cobb Mechanical Contractors v. NLRB,* 295 F.3d 1370, 1379 (D.C. Cir. 2002), citing *Tualatin Electric v. NLRB,* 253 F.3d 714, 718 (D.C. Cir. 2001).

A Compliance Specification issued on September 30, 2005. Relying on the presumption of continued employment, the specification calculated gross back pay from the application date of the three discriminatees. The specification calculated gross back pay based upon comparable employees for a period ending just before letters offering instatement were issued to the discriminatees on July 11, 2005.

Respondent's answer avers that the Compliance Specification is unreliable and should be rejected as the basis of calculating back pay. Respondent argues that, contrary to the Compliance Specification, the discriminatees would not have been transferred or reassigned to another job after the completion of the job for which they were denied employment. Respondent also alleges that discriminatees Mumpower and Johns failed to mitigate their damages. Finally, Respondent posits that willing retention of known union workers after the discriminatees were not hired offsets any back pay owed to the discriminatees.

Rejecting the Respondent's arguments, I find that Respondent failed to rebut the presumption of continued employment of Mumpower, Johns, and Fairchild and that the Regional Director adopted a reasonable gross back pay formula to determine an appropriate amount of net back pay owed to the discriminatees. I also find that the efforts of Mumpower and Johns to mitigate their damages during the period covered by the compliance specification were sufficient. Finally, I find the argument that the subsequent employment of union workers should offset the backpay owed to the discriminatees is untenable.

This case was heard in Junction City, Kansas on January 18, 2006. Based on the entire record, including the Board's Decision and Order, the briefs of the General Counsel**,** the Union and Respondent, testimony of witnesses and my observations of their demeanor, the inherent probabilities and the stipulations of the parties, I make the following

Findings of Facts

I. Issues

1. Was the Regional Director correct in presuming that the discriminatees would have been retained as employees from August 27, 2003, to July 11, 2005, for the purposes of calculating back pay?
2. Was the Regional Director's method of calculating back pay reasonable given the circumstances of this case?
3. Did the discriminatees sufficiently mitigate their damages by making reasonable efforts to secure and retain interim employment?
4. Does the retention of carpenters who were discovered to hold Union membership after being hired subsequent to the discriminatory activity of the Respondent offset any back paid owed to the discriminatees?

II. Facts

A. Methodology Used by the Regional Director

The Board summarized the general purpose of compliance proceedings in *Cobb Mechanical Contractors,* 333 NLRB 1168, 1168 (2001), (*Cobb I*), as follows:

> In compliance proceedings, the Board attempts to reconstruct, "as nearly as possible," the economic life of each claimant and place him in the same financial position he would have enjoyed "but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941). Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Consequently, a back pay award "is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York v. NLRB,* 555 F.2d 304, 305 (2d Cir. 1977).

The Compliance Specification calculations are based on a "Comparable Employee Formula" which is an accepted methodology to determine back pay. *Performance Friction Corp.* 335 NLRB 1117, 1117 (2001), citing *NLRB v. S.E. Nichols of Ohio*, 704 F.2d 921, 924 (6th Cir.), cert. denied 464 U.S. 914 (1983); NLRB Casehandling Manual (Part Three) Compliance, Section 10532.3. The Compliance Specification identifies the relevant pay period as beginning on August 27, 2003, the date of the discriminatees' applications for employment, and ending on July 11, 2005, the date of Respondent's instatement letters.

The comparators identified in the Compliance Specification were employees either hired or re-hired after August 27, 2003, but before July 11, 2005.

Carpenters Gnadt, Driscoll, and Gallaugher were the first three new employees classified as carpenters hired within two months of August 27, 2003. Employee Gnadt was retained from September 3, 2003 to February 13, 2004, when he voluntarily resigned. Employee Driscoll was retained from September 10, 2003 to October 22, 2003, when he was discharged after two consecutive no-shows. Employee Gallaugher was retained from October 9, 2003 to January 20, 2004, when he was laid off. Judge Metz found that while Cheney employed them, both Gnadt and Driscoll were transferred to another job after the project for which they were hired was completed. *Cheney Construction*, 344 NLRB No. 9, slip op. at 6. Another new carpenter, Earnest, was hired in August 4, 2004 and was retained until June 2005.

All other carpenters hired between August 27, 2003 and July 11, 2005 and used as comparators in the Compliance Specification were re-hires; employees who removed themselves from previous employment with Respondent for whatever reason and then were rehired within the backpay period at issue.

The Compliance Specification details how net back pay was calculated for discriminatees Mumpower, Johns, and Fairchild, computed on a calendar quarter basis. Gross back pay for discriminatee Mumpower was based on the comparable earnings of employees Gnadt, Hartenberger, and Brown. Subtracting Mumpower's interim earnings, Mumpower's net back pay was determined to be $17,705.91. Gross back pay for discriminate Johns was based on the comparable earnings of employees Driscoll, Gallaugher, Salser, and Earnest. Subtracting John's interim earnings, John's net back pay was determined to be $19,899.78 (after stipulating to $228.80 of additional interim income during the Compliance Proceeding). Gross back pay for discriminate Fairchild was based on the comparable earnings of employee Clark, an employee classified as a laborer, but found by Judge Metz to have also performed carpentry work. He was classified for insurance purposes as a carpentry employee. Subtracting Fairchild's interim earnings and expenses, Fairchild's net back pay was determined to be $9,358.85.

B. Mitigation of Damages

Discriminatees Mumpower, Johns, and Fairchild all reported interim earnings for the period between August 27, 2003 and July 11, 2005. All testified to using the union hiring hall when they were not employed. Between jobs, each of them collected unemployment insurance.

Discriminatee Mumpower worked for at least two contracting companies in the last quarter of 2003. He worked four different jobs throughout 2004, including one that lasted until October 2005. In addition to the hiring hall, Mumpower testified to acquiring work in 2003 by personally visiting a construction site.

Discriminatee Johns held jobs from December 2003 to April 2004, from June 2004 to January 2005, and from April to October 2005. Johns relied exclusively on the union's hiring hall from April to June 2004. When not employed in 2005, Johns inquired of former employers about job openings in addition to having his name on the hiring hall list.

Discriminatee Fairchild worked for three employers in 2003, including the Carpenters District Council of Kansas City. In 2004, Fairchild held two jobs between January and April, worked a third job in May, and worked two more between September and December 2004. In 2005, he worked for two employers between February and May. When out of work, Fairchild registered at union hiring halls in Manhattan, Kansas City, and Topeka, Kansas. He also spoke with a number of job superintendents of other construction sites about available work. He never turned down work.

C. Retention of Union Carpenters

New-hires Driscoll and Gnadt, comparators used by both the Compliance Specification and the Respondent, were union carpenters whose union affiliation only became known to Respondent after they were hired in early September 2003. Driscoll was willingly retained until he was fired for cause. Gnadt was willingly retained until he voluntarily resigned.

III. Further Findings and Conclusions

In the underlying case, Judge Metz found that the discriminatees were due a traditional make-whole remedy of instatement and backpay based on what the discriminatees would have earned had they not been discriminated against by the employer. I find the Regional Director's proposed remedy as detailed in the Compliance Specification to be appropriate.

A. The Presumption of Continued Employment

Given the particular context of construction industry cases, it is an important remedial consideration in these kinds of disputes whether employees would have been terminated upon the completion of a particular project or whether the employer's practice was to transfer or reassign its workers from project to project.

Before *Dean*, the Board sometimes applied a "precompliance presumption against reinstatement in the construction industry." *Dean*, 285 NLRB at 574. This was due to the fact that many construction workers are hired by contractors for jobs of limited duration without any guarantee of employment from one job to the next.

In *Dean,* the Board overruled the presumption that a Respondent would have terminated an unlawfully discharged employee upon completion of a project. *Id.* at 575. The Board noted a strong policy interest against applying what was in effect "a presumption in favor of an adjudicated wrongdoer while seeking to remedy the underlying unfair labor practice committed against the aggrieved employee." *Id.* at 574. Not only would such a policy be undesirable given the policies of the Act, but from a preservation of evidence standpoint, the Board stated in *Dean* that "the likelihood of an employee's transfer or reassignment is the type of evidence that ordinarily would tend primarily to be in the possession of the respondent employer" and that there was no undue hardship in requiring an employer to maintain such evidence. *Id.* at 574-575; see also *Tualatin Electric,* 253 F.3d at 718.

In time, this became a rebuttable presumption of continued employment of wrongfully terminated employees in construction industry cases. *Tualatin Electric,* 253 F.3d at 718. Given that the same policy considerations and principles are just as relevant in salting cases, such as the one at issue, the *Dean* presumption has been found to have "as much force in cases involving union salts as any other." *Tualatin Electric,* 253 F3d at 718. An employer may rebut the presumption of continued employment by demonstrating that under its "established policies," an employee would likely not have been transferred upon completion of a job. *Id.* at 717; see also *Dean,* above at 575. I find that the Respondent has not met this burden.

Respondent argues that the comparators used in the Compliance Specification are inappropriate and that the discriminatees, had they been hired, would not have remained employees up until the time that instatement was ordered. The basis of Respondent's argument is the decrease in carpenters it employed from 15 in late 2003 to 4 in mid-July 2005.

Respondent answered the Regional Director's Compliance Specification with its own, alternative calculations. Respondent's calculations are based on a similar comparable employee formula; however, they draw from a far narrower pool of comparators. Contrary to the number of workers used as comparators in the Compliance Specification, Respondent posits that the only appropriate comparators were employees Gnadt, Driscoll, and Gallaugher, the first three new carpenters hired after August 27, 2003. Respondent contends that re-hires should not be included as comparators in calculating the gross back pay for the discriminatees, and that carpenter work was unavailable after January, 2004. I disagree.

It would be arbitrary to limit comparators for the purpose of determining back pay to the first three hires made within a specific classification. In *Cobb Mechanical Contractors,* 341 NLRB No. 136, slip op. at 6 (2006), (*Cobb II*), the Board adopted an order that rejected the reasoning, absent further evidence to the contrary, that a discriminatee would have "followed the same employment patterns as the new hires." The fact that this is such a questionable assumption leans in favor of the discriminatees. *Minette Mills, Inc.*, 316 NLRB 1009, 1011 (1995) ("any ambiguities, doubts, or uncertainties are resolved against ... the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination"); see also *Cobb I*, 333 NLRB at 1168; *P*I*E* Nationwide,* 297 NLRB 454, 457 (1989), enfd in relevant part 923 F.2d 506 (7th Cir. 1991). Given the evidence presented, there is simply no reason to believe that the discriminatees' hypothetical employment with the Respondent would have ended when Gnadt, Driscoll, and Gallaugher's employment ended, especially when one was discharged for cause, one voluntarily quit, and the other was laid off.

Although the number of carpenters employed by Respondent declined during the backpay period, there continued to be work available for carpenters on subsequent jobs. In addition to hiring three new carpenters at the beginning of the pay period, Respondent rehired a carpenter in July, 2004, hired a new carpenter and rehired another in August, 2004, and rehired yet another carpenter in October, 2004. General Counsel argues, and I agree, that the evidence shows that there was work available for carpenters within the backpay period at issue.

Additionally, Respondent admitted during the Compliance Hearing to a preference for re-hiring good employees whose work Respondent has been able to observe. Respondent also indicated that he could tell in a short period of time whether a worker was good, and by inference, was worthy of re-hiring or transfer. Respondent further testified to a policy of keeping his core employees busy year round, sometimes at Respondent's own expense. Indeed, Judge Metz found that of the three employees that Respondent argues should be the sole comparators for the discriminatees, two were themselves hired for one project and then transferred to another while under Respondent's employment *Cheney Construction,* 344 NLRB at 6. With the

continued availability of work and a policy for retaining or rehiring prior employees, it cannot be t assumed, even without the *Dean* presumption, that the discriminatees would not have been retained and transferred to perform that work had they been employed in the first place.

B. Reasonableness of Compliance Specification's Back Pay Calculation

The Board in *Cobb I,* above at 1168, stated the following about the how to review compliance specifications:

> The Board's well-settled policy is that "[a back pay] formula which approximates what discriminates would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.,* 313 NLRB 902 (1994), [enfd. mem. 48 F.3d 1242 (10 Cir. 1995)].

There is nothing in the record that shows the "Comparable Employee Formula" used in the Compliance Specification to be either "unreasonable or arbitrary." The Compliance formula correctly assumes, under the *Dean* presumption, that as long as carpenters were being rehired or transferred to other jobs by the employer, there were opportunities for work that could have been filled by the discriminatees had they not been discriminated against.

The Regional Director was careful to take into account a number of factors related to the employee comparators when drafting the Compliance Specification. The Compliance Specification did not include Respondent's six "core" employees as comparators. Nor did it calculate back pay for gaps in comparator employment; the period after one comparator quit or was fired and before the next comparator was hired/rehired. No discriminatee was credited with pay when there was no comparable employee working. I find that the specification accurately approximates what the discriminatees would have earned had they not been discriminated against.

C. Mitigation of Damages

In order to qualify for back pay, an employee must make reasonable efforts to find interim employment. *Midwestern Personnel Services, Inc.*, 346 NLRB No. 58, slip op. at 2 (2006). It is settled Board policy that an employee seeking interim work "need only follow his regular method for obtaining work." *Id.* at 4, citing *Tualatin Electric,* 331 NLRB 36, 36 (1997) (discriminatees satisfied their obligation to mitigate when they followed their normal pattern of seeking employment through the union's hiring hall), enfd. 253 F.3d 714 (D.C. Cir. 2001).

All three discriminatees held multiple jobs between September 2003 and, July 2005. They all took advantage of their union's hiring hall when out of work. Additionally, all three reported looking for work themselves using a number of job-finding techniques during the back pay period, from contacting past employers to personally visiting job sites. There is no showing by the employer that the discriminatees used less than due diligence in trying to find work. To the contrary, the record shows that each discriminatee made an "honest, good faith effort to find interim work." *Midwestern Personnel Services, Inc.*, above at 6, quoting *Chem Fab Corp.,* 275 NLRB 21, 21 (1985). I find that the discriminatees succeeded in mitigating their damages.

D. Retention of Union Carpenters

Respondent asserts in its Third Amended Answer to the Compliance Specification that because new-hires Driscoll and Gnadt were union salts who were nevertheless retained after their affiliation became known, their earnings either off set

any back pay due to the discriminatees or constituted a waiver by the union and the discriminatees of any right to back pay in the amount of wages earned by Gnadt or Driscoll. In the alternative, Respondent asserts that Driscoll and Gnadt's employment constituted a remedial hire and retention that negates any obligation by Respondent to pay back pay in the amount of wages earned by Gnadt or Driscoll. These arguments are not addressed in Respondent's post-hearing brief.

I find no reason to sustain these arguments. The liability of Respondent for violating the Act by discriminating against Union employees has already been established by the Board. A finding of a violation is presumptive proof that back pay is owed to the aggrieved party. *La Favorita,* above at 902. Proof that the Respondent did not repeat its unlawful acts is irrelevant.

Remedy

I find that the Compliance Specification is a reasonable and appropriate remedy to the Respondent's unlawful discrimination against employees Mumpower, Johns, and Fairchild. Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[1]

ORDER

IT IS ORDERED that Respondent, Cheney Construction Inc, forthwith pay to each of the following persons backpay in the amounts set opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of February 4, 2005:

Randy Mumpower	$17,707.91
David Randy Johns	$19,899.78
Kenneth Fairchild	$9,358.85

Dated, Washington, D.C. March 29, 2006

Thomas M. Patton
Administrative Law Judge

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.